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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

STATE OF NEW JERSEY and HOWARD YEAGER, The Principal Keeper of the State Prison at Trenton, New Jersey,

Petitioners,

vs.

UNITED STATES OF AMERICA, *ex rel.*, FLEMING WOODARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONSE NOT PRINTED

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review a judgment of the Court of Appeals for the Third Circuit which affirmed an order of the United States District Court for the District of New Jersey granting a writ of habeas corpus to Fleming Woodard, a State prisoner, who was confined pursuant to a conviction of armed robbery.

Jurisdiction

Defendant was convicted on November 1, 1967 of armed robbery based upon a two count indictment returned by the Essex County Grand Jury.[1] He was then sentenced to a term of not more than ten nor less than seven years in State Prison on the count charging him with the crime of robbery and a consecutive term of imprisonment of not more than two nor less than one year for being armed during its commission.

Defendant thereafter filed a timely notice of appeal in the Superior Court, Appellate Division, where the conviction was upheld. *State* v. *Woodard,* 102 N. J. Super. 419, 246 A. 2d 130 (App. Div. 1968) (Pb6a). The Supreme Court of New Jersey then dismissed defendant's direct appeal and denied his petition for certification. *State* v. *Woodard,* 53 N. J. 84, 247 A. 2d 887 (1968). On June 2, 1969, this Court denied defendant's petition for a writ of certiorari. *Woodard* v. *New Jersey,* 395 U. S. 938 (1969).

Defendant thereafter filed a petition for a writ of habeas corpus in the United States District Court for the District of New Jersey. On November 9, 1970, the District Court granted the petition and a writ of habeas corpus was issued (Pb17a). The State appealed as of right to the Court of Appeals for the Third Circuit and on April 6, 1972, the order of the United States District Court was affirmed in a brief *per curiam* opinion (Pb1a). This application under 28 U.S.C. §1254(1) followed.

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[1] N.J.S. 2A:141-1 provides "any person who forcibly takes from the person of another money or personal goods and chattels, of any value whatever, by violence or putting him in fear, is guilty of a high misdemeanor and shall be punished by a fine of not more than $5,000, or by imprisonment for not more than fifteen years, or both." N.J.S. 2A:151-5 provides an additional penalty if the offense is committed while armed.

Questions Presented

1. Whether the identifications of defendant by the victims of the robbery made at trial were untainted by the impermissibly suggestive pretrial confrontations.

2. Whether the United States District Court accorded proper deference to the fact findings of the New Jersey Superior Court, Appellate Division.

Statement of the Case

This is an application for a writ of certiorari to review a judgment of the Court of Appeals for the Third Circuit which affirmed an order of the United States District Court granting a writ of habeas corpus.

The State's proof at trial disclosed that at approximately 3:00 P.M. on April 27, 1967, an armed robber entered the offices of the Atlantic Manufacturing Company in Newark, New Jersey, robbed its executive vice-president, Joseph Skopaz, and an employee, Minervra Almodavar, and escaped with the sum of $716. Mr. Skopaz testified that on the afternoon in question, he was seated at his desk when he heard the sound of a male voice emanating from a room outside his office. Skopaz left his desk and observed a man, later identified as defendant, descending the steps of the factory. The witness then returned to his desk, and approximately one minute thereafter, observed defendant standing in the doorway of his office holding a revolver with a long barrel. Defendant ordered Skopaz and Mrs. Almodavar, who was then present, to hand over all of the cash in their possession. Mrs. Almodavar walked to the safe and handed defendant a strongbox containing $716. At this time, a distance of approxi-

mately five to six feet separated Skopaz from defendant and he was able to observe the cartridges in the cylinder of Woodard's revolver.

After receiving the strongbox, defendant asked whether there was any other money in the office. When Skopaz responded in the negative, Woodard advised him that if he were not telling the truth he would be shot. Defendant then fled from the office.

Skopaz observed defendant and an accomplice ascend the stairway and run to a light blue Cadillac automobile which was double-parked in front of the building. He was able to observe the license plate of the automobile and Mrs. Almodavar recorded the number on a sheet of paper. The witness then ran from the office to his own automobile and unsuccessfully gave chase. The police were then summoned and immediately responded to the scene.

During the course of the trial, Skopaz positively identified defendant as the perpetrator of the crime. He noted that approximately five minutes had elapsed during the commission of the robbery and defendant's face was clearly visible to him during this period of time.

Defense counsel objected to the State's identification testimony upon the ground that an illegal pretrial confrontation had been conducted in the absence of counsel and was so unnecessarily suggestive and conducive to irreparable mistaken identification as to be violative of due process of law. During the colloquy between court and counsel, the attorney further indicated that the in-court identification was tainted by the illegal pretrial confrontations. The trial judge stated that he would sustain the objections if not for the fact that the United States Supreme Court's decision in *United States* v. *Wade*, 388 U. S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967) was applicable only with

respect to identifications occurring subsequent to June 12, 1967. Defense counsel then argued that the identification procedure employed by the police was defective and that the failure to provide counsel violated the principles set forth in *Miranda* v. *Arizona*, 348 U. S. 436, 84 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The court stated that it did not believe that defendant was "a prime suspect" when the identification took place and therefore denied defense counsel's objection. Nevertheless, the court conducted a hearing out of the presence of the jury and permitted defense counsel to introduce testimony with regard to the out-of-court confrontation for the purpose of preserving such testimony for appellate review.[2]

Testimony taken at the hearing out of the presence of the jury disclosed that Skopaz was shown three or four photographs, none of which were of defendant, on the day following the robbery. The witness indicated to the police that he was unable to recognize any of the persons shown in the photographs. Prior to the identification of defendant, Skopaz and Mrs. Almodavar were also taken to police headquarters where they were shown another suspect. The victims failed to recognize the other man.

That same day, the police paraded two men individually, about an hour apart, on the sidewalk approximately seven feet in front of the Atlantic Manufacturing offices while the victims peered through the slats of venetian

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[2] The Court apparently reached the erroneous conclusion that the defendant was not entitled to challenge the out-of-court identification since it occurred before June 12, 1972. Evidently the trial judge did not consider this Court's decision in *Stovall* v. *Denno*, 388 U. S. 293, 87 S. Ct. 1602, 18 L. Ed. 2d 1199 (1967). Moreover, the trial judge did not fully understand the thrust of defendant's argument; i.e. that the in-court identifications were inadmissible since they were tainted.

blinds. The two men, both Negroes, were brought before the witness's office window in precisely the same manner. Skopaz and Mrs. Almodavar were unable to identify the first man but immediately recognized the second, Fleming Woodard, as the perpetrator of the crime. Skopaz did not remember whether defendant was handcuffed, but he was certain that no suggestive remarks were made to him by any of the police officers present during the identification.

Skopaz remembered that defendant was closest to the window in his direct line of vision and that a police officer accompanied him for a distance of approximately ten feet. No police officer was present in Skopaz's office during the identification. A detective remained inside Mrs. Almodavar's office which was approximately five feet from that of Skopaz and separated by a partition. Upon seeing defendant, Skopaz noted on a yellow sheet of paper that he was the robber and gave it to the detective in the next room.

After the window identification, Skopaz proceeded to police headquarters where he prepared a written statement. While at the station house, the witness observed defendant seated in a chair near one of the detective's offices.

During the hearing out of the presence of the jury, in response to a question propounded by defense counsel, Skopaz testified that his in-court identification was based "primarily" on his observations of the defendant during the commission of the crime. He further noted that his identification at the Atlantic Manufacturing Company as well as his observation of defendant at police headquarters did not contribute to his in-court identification.

Upon the conclusion of the *voir dire* hearing, the court recessed for the day. The following morning the trial

judge announced that it would be unnecessary to take further testimony out of the presence of the jury with regard to the pretrial identification. The court ruled that the probative value of the testimony concerning the pretrial identification was outweighed by the possible prejudice to the accused under *Rule 4* of the *New Jersey Rules of Evidence,* and, therefore, the State was precluded from introducing further testimony.[2] Defense counsel then stated that he would waive the ruling in order to permit the evidence to go before the jury to show that the in-court identification was tainted.

Mrs. Almodavar testified in the presence of the jury that she was employed by the Atlantic Manufacturing Company as a clerk typist and was working in the office on April 27, 1967, when, at approximately 3:00 P.M., she heard a knock at the door. The witness went to the door and observed two Negro males through the window, one of whom she later identified as defendant. Defendant asked for an application for a job and Mrs. Almodavar replied that the company was not hiring at that time. As she was returning to her desk, the witness observed defendant inside the office holding a revolver pointed in her direction. Defendant instructed the witness not to move or scream and ordered her to give him all her money. She then walked to the safe and handed defendant the petty cash box. After obtaining the strongbox, defendant fled from the scene. The police responded to Mrs. Almodavar's telephone call approximately ten minutes after defendant had left the office.

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[2] The judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will either (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury.

At approximately 4:00 P.M. on the day following the robbery, Mrs. Almodavar identified defendant from her office at the Atlantic Manufacturing Company. At the same time, Skopaz was in his office which was separated from that of Mrs. Almodavar and he also identified defendant. Nevertheless, the two victims did not converse prior to their respective identifications.

During the course of the trial, Mrs. Almodavar identified defendant as the perpetrator of the robbery. She testified that defendant was approximately two feet from her when he asked for an application for a job and that approximately one to two minutes had elapsed during their initial conversation. Moreover, only five feet separated defendant from the witness during the commisison of the robbery which took approximately two minutes and Woodard's face was plainly visible to the witness during most of this time.

Leonard McGhee, a Newark Police Officer, testified that he and his partner, Patrolman Sidney Kutakoff, responded to the scene of the crime pursuant to a police dispatch. Upon arriving at the offices of the Atlantic Manufacturing Company, Officer McGhee met Mrs. Almodavar who told him that a robbery had occurred. She described the robber as a Negro male, five feet six inches tall, approximately 24 years old, and weighing 160 pounds. Based upon additional information supplied to him, Officer McGhee sent out a teletype describing a light blue Cadillac automobile bearing registration numbers IYC 720.

Detective John M. Farley of the Newark Police Department was the last witness for the State. Detective Farley described the police investigation of the automobile and license number which eventually led to a residence at 45 Johnson Avenue in the City of Newark. On

the strength of their investigation the officers secured an arrest warrant for robbery for three unknown men at 45 Johnson Avenue. It was at that address that defendant Fleming Woodard was arrested and charged with armed robbery.

Following his conviction, defendant filed a direct appeal in the New Jersey Superior Court, Appellate Division. The Appellate Division held that the pretrial confrontations were unduly suggestive, but that the identification of defendant by Skopaz and Mrs. Almodavar at trial were not tainted. This factual finding was made from the record of the trial proceedings. Defendant's petition to the Supreme Court of New Jersey was thereafter denied, but the United States District Court, without hearing argument, granted a writ of habeas corpus.

REASONS FOR DENYING THE WRIT

POINT I

The in-court identifications of defendant by the victims of the robbery were untainted by the out-of-court confrontations.

In *Stovall* v. *Denno,* 388 U. S. 293, 87 S. Ct. (1967), 18 L. Ed. 2d 1199 (1967), this Court held that testimony concerning an out-of-court lineup identification was excludable on the basis of due process of law under the Fourteenth Amendment if it was obtained by means of an unnecessarily suggestive identification procedure conducive to an irreparable misidentification. It was further noted that *United States* v. *Wade,* 388 U. S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967) and *Gilbert* v. *California,* 388 U. S. 263, 87 S. Ct. 1961, 18 L. Ed. 2d 1178 (1967), re-

quiring the presence of counsel at postindictment confrontations, were not to be applied retroactively to lineups occurring prior to June 12, 1967. *Stovall* v. *Denno, supra,* 388 U. S. at 301, 302, 87 Sup. Ct. at 1972, 18 L. Ed. 2d at 1206. See also *Coleman* v. *Alabama,* 399 U. S. 1, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (1970); *Foster* v. *California,* 394 U. S. 440, 89 S. Ct. 1127, 22 L. Ed. 2d 402 (1969). And in *Simmons* v. *United States,* 390 U. S. 377, 88 S. Ct. 1967, 19 L. Ed. 2d 1247 (1968), this Court held that its decision in *Stovall, supra,* was also applicable to photographic as well as in-person identifications.

Once it is determined that testimony relating to an out-of-court confrontation must be excluded due to impermissible suggestiveness, then it is incumbent upon a court to decide whether the in-court identification of the accused has been tainted thereby. If the evidence introduced at trial clearly and convincingly discloses that the in-court identification is untainted by the improper pretrial confrontation, evidence relating to it is admissible. *United States* v. *Wade, supra,* 388 U. S. at 239-42, 86 S. Ct. at 1939-40, 18 L. Ed. 2d at 1164-66; *Gilbert* v. *California, supra,* 388 U. S. at 272, 86 S. Ct. at 1966, 18 L. Ed. at 1186.

Of paramount importance in making this determination is the extent to which the procedures employed by the police have had the effect of leaving an indelible impression on the victim's mind so as to preclude a fair and impartial identification of defendant at a later date. A marginally defective pretrial confrontation may be so unfair in due process terms as to prohibit the admission of testimony relating to it, yet may not be so unduly suggestive as to preclude an independent and impartial identification at trial. The circumstances surrounding the defective pretrial confrontation clearly bear upon the issue

of whether the in-court identification was tainted. See *Hawkins* v. *United States*, 420 F. 2d 1306, 1309 (D. C. Cir. 1969); *Frazier* v. *United States*, 419 F. 2d 1161, 1169-71 (D. C. Cir. 1969).

The record below reveals that the pretrial confrontations in the instant case were only marginally defective and did not have the capacity to taint the victims' identifications at trial. The circumstances surrounding the identification of defendant at the Atlantic Manufacturing Company have been set forth in full in the *Statement of the Case, infra,* and need not be repeated at length here. Suffice it to say that the identification procedures employed by the police, though defective, were not so suggestive as to preclude an impartial and objective identification at trial.

It is to be noted that the initial unsuccessful attempt to have the victims of the crime identify another suspect at police headquarters was clearly more suggestive than the procedures employed in identifying the defendant at the Atlantic Manufacturing Company. The second attempt to have Mr. Skopaz and Mrs. Almodavar make an identification also resulted in failure and the procedures employed by the police on that occasion were as suggestive as those utilized in the subsequent identification of defendant. The other suspect, who was handcuffed at the time, was paraded in front of the Atlantic Manufacturing Company offices.

It is significant that these instances involved an approach by the police at least as suggestive as that under which defendant was subsequently identified. The fact that two other suspects were individually shown to the witnesses who failed to recognize them clearly supports the inference that the subsequent identifications of defend-

ant were reliable and were based upon the victims' observations during the commission of the robbery.

Undoubtedly, the parading of defendant before the two victims constituted a confrontation in violation of the due process clause. Nevertheless, the procedures employed by the police were not so unreliable as to clearly convey the suggestion to the witnesses that defendant was the guilty party. The pretrial identifications were not so unduly suggestive as to taint the victims' subsequent identifications at trial which were based upon their observations of defendant during the commission of the robbery.

This Court has contemplated that in-court identifications may be found capable of standing on their own feet even though preceded by deficient pretrial confrontations if they are derived from an independent source. *United States* v. *Wade, supra; Gilbert* v. *California, supra.* Also see *Clemons* v. *United States,* 408 F. 2d 1230, 1242 (D. C. Cir. 1968), *cert.* denied 394 U. S. 964 (1969). In making this determination, much will depend upon the witness's initial opportunity and motivation to make accurate observations of the accused during the commission of the crime. *United States ex rel. Phipps* v. *Follette, supra,* at 915. The effort must be to determine whether, before the imprint arising from the unlawful identification procedure, there was already such a definite image in the witness's mind that he is able to rely upon it at trial without much, if any, assistance from its successor. *Clemons* v. *United States, supra,* 1237.

The circumstances surrounding the commission of the robbery in the instant case clearly support the finding of the Superior Court, Appellate Division, that the identifications at trial were based upon the victims' observa-

tions of defendant during the crime. Defendant was unmasked and viewed by both Skopaz and Mrs. Almodavar for several minutes in a well lighted office. A distance of approximately five feet separated defendant from Skopaz and the witness was able to observe the number of cartridges contained in the cylinder of the revolver in Woodard's hand. Moreover, Skopaz carried on a conversation with defendant who ordered him to turn over his money. After obtaining the strongbox, defendant again confronted Skopaz to ascertain if there was any other money present in the office. When Woodard left his office, the witness observed defendant descend the front steps to the plant and drive off with an accomplice in a blue 1963 Cadillac automobile.

The uncontroverted opportunity of Skopaz to view defendant during the commission of the robbery formed the basis for his in-court identification. The witness testified that his positive in-court identification was based upon having seen defendant at the time of the robbery and that the pretrial confrontation did not in any way contribute to his testimony at trial.

Mrs. Almodavar's observation of defendant during the commission of the robbery was even more extensive than that of Skopaz. She initially observed defendant through a glass window in the front door of the plant a few minutes prior to the robbery. At this time, defendant and Mrs. Almodavar were separated by a distance of two feet. Upon returning to her desk, the witness again observed defendant standing in front of her desk holding a loaded revolver. While there is some testimony that Mrs. Almodavar was instructed to keep her head down, it is also uncontroverted that defendant was within her vision at all times and that he accompanied her to the open safe

to obtain the petty cash box. The record below thus provided a sufficient basis for the Appellate Division to conclude that the in-court identifications were based upon observations during the commission of the robbery.

In granting defendant's petition, the United States District Court agreed with the conclusion of the Appellate Division that the pretrial confrontations were improper, but disagreed with its finding that the in-court identifications of defendant were derived from an independent source. The only question properly before the Court was whether the State's factual determinations were fairly supported by the record as a whole. See *Townsend* v. *Sain,* 372 U. S. 293, 313, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963). Also see Wright and Sofaer, "Federal Habeas Corpus for State Prisons: The allocation of fact-finding responsibility," 75 Yale L. J. 895, 946 (1966), Note 76 *Harv. L. Rev.* 1234, 1263 (1963). It is submitted that the District Court improperly substituted its own factual determination for that of the Appellate Division.

Substantial interests of federalism and comity militate for a narrow scope of review of state fact findings. The fact-finding role of the state courts in constitutional adjudications constitutes one of the last areas in which the judgment of state judges is generally accepted. See 5 *Moore, Federal Practice* § 52.03(1) (2d Ed. 1951). The decision of the District Court substantially dilutes this important role performed by the state courts. While the instant case does not involve a fact-finding of a trial court (see *Davis* v. *North Carolina,* 384 U. S. 737, 741-42, 86 S. Ct. 1761, 1764-65, 16 L. Ed. 2d 895, 898 (1966)), traditional principles of comity dictate that the resolution of factual issues by state appellate courts should be af-

forded great deference.[4] See for example *Cameron* v. *Johnson,* 391 U. S. 361, 88 S. Ct. 1671, 20 L. Ed. 2d 647 (1968).

The record below clearly supports the finding of the Appellate Division that the in-court identifications of defendant were not tainted by the pretrial confrontations. The potential danger of prejudice emanating from the pretrial identifications in the instant case is clearly not as great as that presented in *United States ex rel Phipps* v. *Follette, supra,* where the Court of Appeals for the Second Circuit accepted the findings of the state judge that the in-court identifications were not tainted. There, defendant filed a petition for a writ of habeas corpus in the United States District Court seeking to reverse his conviction for burglary. The State's proof disclosed that the victim of the crime lived in the back room of a service station and was awakened on the night in question by the sound of coins striking the floor. When he opened the door to the sales office, the witness was confronted by defendant's co-defendant. A struggle ensued in which the witness pushed the co-defendant over a snowplow. A moment later, defendant entered the room and threatened the victim with a sledgehammer. The victim observed the defendant for approximately twenty seconds, during part of which he was struggling with the co-defendant. An hour later, the witness was summoned to police headquarters and shown two men who he identified as the perpetrators of the crime. Later, he identified the defendant at a preliminary hearing.

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[4] In *Cooper* v. *Picard,* 428 F. 2d 1351 (1st Cir. 1970), the Court of Appeals for the First Circuit noted that the issue of whether state appellate findings of fact are sufficient to avoid a federal hearing in the light of *Townsend* v. *Sain, supra,* has not been decided.

At trial, the witness testified that he recognized the defendant through three previous encounters—in the service station during the commission of the crime, at the police precinct, and at the preliminary hearing. He further testified that his in-court identification was not "because" of having seen Phipps at the station house. The trial court held that the pretrial identifications were improper but concluded that the in-court identification was not tainted thereby. The Court of Appeals affirmed the decision of the District Court denying the defendant's petition. The Court stated:

> Under these principles, we see no basis for rejecting the conclusions of the state judge that Mattson, [the victim] was able to identify Phipps through his encounter at the service station rather than in the police station. Mattson was a prospective victim of an assault, not a mere bystander. There was time enough for the second burglar's image to become indelibly seared in his memory. His twenty to thirty second observation was much more than a fleeting glance, as anyone who watches a second hand of a clock sweep by for that period can attest. Mattson never entertained the slightest doubt about the identification of the second man. When he saw Phipps only an hour or so after the burglary, he immediately identified him, as he was to do on three later occasions. *Id.* at 916.

Also see *United States* v. *De La Cruz Bellinger,* 422 F. 2d 723, 727 (9th Cir. 1970); *United States* v. *Terry,* 422 F. 2d 704, 709-10 (D. C. Cir. 1970); *United States* v. *Broadhead,* 413 F. 2d 1351, 1359-61 (7th Cir. 1969); *Joinder* v. *State of Maryland,* 7 Md. App. 692, 695, 257 A. 2d 444, 451 (Ct. of App. 1969); *Commonwealth* v. *Robinson,* 355

Mass. 620, 624, 246 N. E. 2d 669, 673 (Mass. Sup. Jud. Ct. 1969).

Similarly, in *Simmons* v. *United States, supra,* this Court affirmed a conviction notwithstanding a less than ideal pretrial identification of the accused from police photographs. There, the robbery took place in the afternoon in a well lighted bank and the robbers wore no masks. The Court concluded that the pretrial identification procedure employed by the police was not unduly suggestive and that the in-court identification emanted from the witness's observations during the commission of the crime.

The record below presents the testimony of two honest, credible witnesses who had ample opportunity to observe defendant during the commission of the robbery. The record clearly supports the Appellate Division's finding that their in-court identifications were not based upon the improper confrontations. The District Court and the Court of Appeals would have these laymen perform impossible mental gymnastics in order to conform to their interpretation of the law. The findings of the Appellate Division were not clearly erroneous and the District Court's order granting defendant's petition for a writ of habeas corpus should be reversed.

Even assuming that introduction of the victims' identifications of defendant at trial was error, it was harmless beyond a reasonable doubt. The in-court identifications of defendant by Skopaz and Mrs. Almodavar were cumulative to each other and the erroneous admission of one did not contribute or materially affect the verdict of the jury. Under such circumstances, the failure to exclude either of the witnesses' allegedly tainted testimony constituted harmless error. See *United States* v. *Wade, supra,* 388 U. S. at 242, 87 S. Ct. at 1940, 18 L. Ed. 2d at

1166; *Gilbert* v. *California, supra,* 388 U. S. at 272, 87 S. Ct. at 1956, 18 L. Ed. 2d at 1186; *Chapman* v. *California,* 386 U. S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Also see *State* v. *Griff,* 164 Wash. 78, 450 P. 2d 486 (Sup. Ct. 1969).

One final consideration deserves attention in determining whether the admission of the identification testimony constituted reversible error. The United States Supreme Court's decisions in *Wade, supra,* and *Gilbert, supra,* were based upon the alleged inability of defense counsel to accurately evaluate the reliability of an identification made under controlled circumstances at a time in which he is not present. The same reasoning presumably justifies the Supreme Court's decision in *Stovall, supra,* concerning the admission of evidence based upon an unnecessarily suggestive confrontation.

It is obvious that convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the methods employed by the police having a potential for error. *Simmons* v. *United States, supra,* 390 U. S. at 384, 88 S. Ct. at 981, 19 L. Ed. 2d at 567 (1968). Also see *Gregory* v. *United States,* 410 F. 2d 1016, 1023, 1024 (D. C. Cir. 1969). That being so, it is appropriate to consider the ability of the jury to evaluate the reliability of the identifications in the case at bar.

Defense counsel, in the instant case, intentionally waived the trial court's ruling excluding the State's evidence relating to the pretrial identifications, because he wanted the jury to be aware of the unreliability of the out-of-court confrontations and the manner in which they may have affected the witnesses' in-court identifications. Thus, the defense purposely introduced evidence relating to the

pretrial confrontations. The jury was aware of the suggestive procedures utilized by the police leading to the identification of defendant. Defense counsel placed great emphasis upon the unreliability of the identifications at the Atlantic Manufacturing Company. Under these circumstances, the admission of the in-court identifications of defendant by Mr. Skopaz and Mrs. Almodavar was harmless error.

POINT II

This Court should revaluate its holding in *Townsend* v. *Sain*, and restrict the power of the federal courts in habeas corpus cases to make fact findings in derogation of those made by state courts.

The instant case presents the recurring issue of the respective roles of the federal and state court systems. Our federal system was based upon a widespread distrust of centralized power. Even today, citizens look first to the State judiciary for "fair and effective prosecution of violators of the criminal law." *State* v. *Funicello*, 60 N. J. 60, 70, —— A. 2d —— (1972), concurring opinion of Chief Justice Weintraub. And primary among the responsibilities of the State is the protection of its citizens from criminal attack.

Nevertheless, no one can seriously dispute the fact that power has shifted from the state to the federal courts. Issues once thought to be merely evidentiary in nature now fall within the purview of constitutional questions. The instant case clearly dramatizes the recurrent utilization of federal habeas corpus as merely another step in the appellate process. Five years after the defendant's conviction, it is now learned that error of constitutional

dimension was committed. The significance of this fact should not escape judicial attention for, upon the supposition that the United States District Court Judge was correct, the defendant has been unlawfully incarcerated during this time.

The public is understandably confused. Respect for the law is thereby diminished. Constitutional adjudication often requires judicial determination of a factual question rather than "an evident application of a precise rule of law." *State* v. *Funicello, supra,* 60 N. J. at 72. That being the case, federal trial judges are thus given the responsibility to review the factual determinations of state courts "by no more than a substitution of their factual evaluations for those" of the state judges. *Ibid.*

Certainty and finality in factual adjudications are high among present priorities. No one is "benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved." See dissent of Justice Harlan in *Mackey* v. *United States,* 401 U. S. 667, ——, 91 —— 1160, 28 L. Ed. 2d 404 (1971). The routine utilization of habeas corpus after an unhappy state appellate experience constitutes a perversion of the writ.

The State of New Jersey, therefore, submits that it is incumbent upon this Court to revaluate its prior decision which, in effect, has made the United States District Courts appellate tribunals of greater dignity than the states' highest courts. Federal court review of state factual determinations should be restricted so as to achieve a proper balance of judicial power and authority.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

JOSEPH P. LORDI
Essex County Prosecutor

DAVID S. BAIME
Assistant Prosecutor
Counsel for Petitioners

APPENDIX A

Opinion of the United States Court of Appeals

(Filed—April 6, 1972)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 71-1147

UNITED STATES OF AMERICA, *ex rel.*
FLEMING WOODARD,

Appellee,

v.

STATE OF NEW JERSEY and HOWARD YEAGER, The Principal Keeper of the State Prison at Trenton, New Jersey,
STATE OF NEW JERSEY,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued January 4, 1972

Before HASTIE and M. ROSENN, *Circuit Judges,* and
MCCUNE, *District Judge*

Appendix A

PER CURIAM:

This is an appeal by the State of New Jersey from an order of the District Court for the District of New Jersey granting a writ of habeas corpus to Fleming Woodard, a state prisoner who is confined pursuant to a conviction of armed robbery.

An in court identification of the accused by Mrs. Almodovar, the victim of the robbery, was a major part of the prosecution's case against Woodard. The evidence showed that after Woodard had been arrested, he was paraded in handcuffs outside Mrs. Almodovar's window for her observation and identification. Woodard did not have counsel at the time of this viewing. At the trial, which occurred after the decisions in *United States* v. *Wade*, 1967, 388 U. S. 218 and *Gilbert* v. *California*, 1967, 388 U. S. 263, Mrs. Almodovar admitted on cross-examination that her in court identification was based in part upon her recollection of the hold-up and in part upon "seeing him for a much longer period of time the next day when he was paraded in front of . . . [her] building." In the light of this admission the district court properly concluded that the in court identification was not independent of the uncounseled exhibition of the accused and, therefore, that under the rule of *Wade* and *Gilbert* the conviction to which that identification led could not stand. This reasoning is elaborated in the opinion of the district court and to us it is persuasive.

The district court also discussed the possibility that in court identification by Skopaz, a second eyewitness, may also have been influenced by the uncounseled exhibition of the accused. However, the district court did not decide this question, and neither do we. Accordingly, the

parties will be free to raise and explore this issue before or during a new trial, if the state shall undertake to try the accused again.

The judgment will be affirmed.

A True Copy:

Teste:

THOMAS P. QUINN
Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 71-1147

UNITED STATES OF AMERICA, *ex rel.*
FLEMING WOODARD,

Appellee,

v.

STATE OF NEW JERSEY and HOWARD YEAGER, The Principal Keeper of the State Prison at Trenton, New Jersey,
STATE OF NEW JERSEY,

Appellant.

(D. C. Civil Action No. 586-70)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present:

HASTIE, and ROSENN, *Circuit Judges* and MCCUNE, *District Judge*

Appendix B

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed November 9, 1970, be, and the same is hereby affirmed, with costs taxed against appellant.

ATTEST:

THOMAS P. QUINN
Clerk

April 6, 1972

APPENDIX C

Opinion of the Superior Court of New Jersey Appellate Division (102 N. J. Super. 422)

STATE OF NEW JERSEY, etc.,

Plaintiff-Respondent,

v.

FLEMING WOODARD,

Defendant-Appellant.

HALPERN, A.J.S.C. (temporarily assigned). Defendant appeals from a judgment of conviction for armed robbery. He bases his appeal on four grounds: (1) the court erred in allowing testimony by the State's witnesses identifying defendant before and at trial, the circumstances attending the out-of-court identification being such as to deprive him of a fair trial and a denial of due process; (2) the court erred in refusing to permit defendant to call an alibi witness; (3) the court erred in its supplementary instructions to the jury, and (4) his assigned counsel (not the present counsel on appeal) was so incompetent as to deprive him of the effective assistance of counsel.

The State's proofs indicate that about 3 p.m. on April 27, 1967 an armed robber entered the offices of the Atlantic Manufacturing Company in Newark, New Jersey, held up and robbed its executive vice-president, Joseph Skopaz,

and an employee, Minerva Almodovar, and escaped with the sum of $716. The robber was not masked and stood five or six feet from the victims. Skopaz testified he was close enough to the robber so that he could count the bullets in the gun. In addition there was a short exchange of conversation between the victims and the robber. The victims furnished the police with the license number and make of the get-away car and a description of the robber.

Identification of Defendant

[1] The day following the robbery the police showed the victims four photographs of different persons, but they were unable to identify the robber. That same day, the police paraded two men about an hour apart, on the sidewalk some seven feet in front of the Atlantic offices, while the victims peered through the slats of venetian blinds. They were unable to identify the first man. They did immediately identify defendant as the second man. Mrs. Almodovar said defendant was handcuffed to a policeman. Skopaz did not remember whether he was handcuffed. A detective testified he thought the defendant was handcuffed but not to another policeman, and that the handcufing was concealed. For purposes of this opinion we assume defendant was handcuffed in a manner apparent to the identifying witnesses.

Both victims made positive identifications of the defendant at the trial. Skopaz further testified that his identification was based on what he remembered from the robbery and was not influenced by the out-of-court identification.

Defendant objected to the State's identification testimony on the ground that the circumstances attending the

out-of-court identification were such as to violate his right to counsel, both under the rule of *Miranda* v. *State of Arizona,* 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and that of *Wade* v. *United States,* 388 U. S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967). In the course of the colloquy between court and counsel it was clear defendant had in mind, in addition to the absence of counsel at the time of the identification, that the circumstances surrounding the identification were so unfair as to taint the in-court identification. This was based on the reasoning in *Wade, supra,* that an out-of-court identification made under circumstances suggestive to the witnesses of the belief of the police that the suspect being exhibited is the guilty party has a tendency to cause the witnesses to rely upon that identification rather than the observation made at the time of the criminal occurrence, when identifying the defendant in court (388 U. S., at pp. 232-237, 87 S. Ct. 1926).

The trial court apparently did not recognize the thrust of the latter feature of the defendant's objections. It did not rule on it. It did rule that the *Miranda* objection was not applicable because the focus of the investigation had not yet sufficiently concentrated on defendant (defendant has not relied upon *Miranda* on this appeal and we do not discuss the point any further). It further held that the right of a defendant to counsel at a lineup was not applicable in this case because the out-of-court identification had occurred prior to the decision of the *Wade* case on June 12, 1967. See *Stovall* v. *Denno,* 388 U. S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967). However, it did rule that there was sufficient identification of possible unfairness in the circumstances surrounding the out-of-court identification as to warrant the excluding of the out-

of-court identification on the basis of *Rule* 4 of the *Rules of Evidence* (1957) (prejudicial danger outweighing value of the evidence from a probative standpoint). Defendant declined to accept this offer, feeling that he ought to have the evidence of the out-of-court identification in the record in order to attempt to convince the jury that the circumstances attending it were such as to taint the reliability of the in-court identification.

Notwithstanding the waiver of the court's offer, aforementioned, defendant never abandoned his position that the in-court identification by the victims should be barred because tainted by the circumstances surrounding the out-of-court identification. As already noted, this particular objection was never ruled upon by the trial judge. We construe *Wade* to hold that in such a situation the trial judge should make his own determination as to whether, given an unfair prior confrontation for identification, the State can "establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the [out-of-court] identification" (388 U. S., at p. 240, 87 S. Ct., at p. 1939); *People* v. *Ballott,* 20 N. Y. 2d 600, 286 N. Y. S. 2d 1, 233 N. E. 2d 103 (Ct. App. 1967).

[2] Undoubtedly the parading of defendant before the two victims, whether handcuffed to a detective or handcuffed and accompanied by a detective, constituted a confrontation violative of elementary principles of fairness in out-of court identification. See *Wade, supra,* 388 U. S., at page 234, 87 S. Ct., at page 1936, referring to the method of identification employed in *Stovall* v. *Denno, supra,* where the suspect was presented to the witness alone, handcuffed to police officers, as representing "a situation

• • • clearly conveying the suggestion to the witness that the one presented is believed guilty by the police."

[3] In these circumstances we would ordinarily be inclined to remand the matter to the trial judge for a determination of the issue as to whether the totality of the circumstances establishes clearly and convincingly that the in-court identification was the independent product of the observation of defendant by the witnesses at the time of the robbery and not substantially contributed to by the circumstances of the out-of-court identification. In the present instance, however, the trial judge has passed away, and there is no opportunity to do this. Under the circumstances, we think it entirely consonant with the interests of justice for this court to consider whether the proof of record is sufficiently clear to enable us to make that fact determination, and we have decided that it is.

[4] The closeness of the robber to the victim witnesses at the time of the robbery, and the added opportunity for carefulness of identification by the circumstance of some conversation between the robber and the witnesses, plus the positiveness with which Skopaz testified at the trial on cross-examination that the out-of-court identification did not contribute to his in-court identification but that the latter was derived entirely from his observations at the time of the robbery, satisfy us that it is clearly and convincingly established that the in-court identifications are not tainted by the circumstances of the out-of-court confrontation and identification. See also *State* v. *Matlack*, 49 N. J. 491 (1967) and *Simmons* v. *United States*, 390 U. S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968), where the United States Supreme Court was satisfied that notwithstanding a less than ideal pretrial identification of defendant from various photographs, the identification of

defendant by the witnesses at the trial was such as to warrant a conclusion that there was no taint from the prior out-of-court identifications. The court stated that the in-court identification would be set aside only if the improper out-of-court identification was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." The court further concluded that in the circumstances of the case before it there was little chance that the procedure utilized led to misidentification of defendant. The court noted that the robbery took place in the afternoon in a well-lighted bank and that the robbers wore no masks. This is closely comparable to the present facts.

The fact that the victims were shown four photographs with negative results and that prior to their out-of-court identification of defendant another individual was shown to them does not bear particularly on the issue we have to decide here one way or the other.

We thus conclude that on the record before us we are justified in finding as a fact that defendant was not prejudiced by being permitted to be identified in court by the victims of this robbery.

The Alibi Witness

Defendant contends the court erred in not permitting him to call an alibi witness, thereby depriving him of due process of law. The issue arose thusly: During the cross-examination of the State's last witness counsel conferred with the court out of the jury's presence. The discussion dealt with whether defendant would testify in his own defense in view of his prior criminal record. Defense coun-

sel at that point, for the first time, indicated that if defendant decided to testify he wanted to call an alibi witness, even though defendant had failed to comply with R.R. 3:5-9 in not furnishing the data called for in the rule. Ultimately, defendant decided not to testify, so that his conditional request to offer an alibi witness was inferentially withdrawn.

[5, 6] In any event, R.R. 3:5-9 makes it discretionary with the court as to whether a noncompliance with its provisions will be waived. Considering the lateness of the application, the failure of defendant to indicate who the alleged alibi witness was or that he was even available, the court's refusal to waive the provisions of the rule was a sound exercise of his discretion. To have waived the provisions of the rule, at that point in the trial, would have been highly unfair and prejudicial to the State—and an adjournment to allow the State to investigate the witness, and the information furnished, would not have cured this eleventh hour application. *State* v. *Baldwin,* 47 N. J. 379 (1966); *State* v. *Garvin,* 44 N. J. 268 (1965).

Supplementary Instructions to Jury

Defendant urges two issues of alleged error which occurred after the jury had retired to consider its verdict. They will be dealt with separately.

[7] About an hour after the jury retired it asked to see the notes used by Detective Farley to refresh his recollection. The court denied the request telling the jury the notes had not been marked in evidence but only for identification, and therefore the jury could not have them. Defendant objected to this supplemental charge. He con-

tends it may have misled the jurors to disregard any discrepancies they may have found to exist between the notes and Farley's testimony. This is a very nebulous objection and presupposes that the jury, when it made its request, had decided there was or might be some discrepancy. We should not be called upon to speculate. The supplemental instruction given was legally correct and, when considered in the light of the original charge, informed the jurors that they were the sole judges of the facts, and that "any views of mine are totally irrelevant, and it is your recollection of the evidence and your determination of the issues of the facts which will control." Reading the original and supplemental charges as a whole, the jury could not have been misled. If it was error not to charge as requested by defendant, it was harmless error.

The jury returned a second time and posed the following question:

> "Agreement has been reached that a witness was 100 percent sure in his/her own mind when identifying a defendant. Does it follow that the jurors are bound to accept the identification as correct?"

The court immediately gave the following supplemental charge to the jury:

> "Now, the court cannot specifically help you in the determination of who to believe and where the truth lies. It is up to you to decide that.
>
> If a witness testifies that he or she made this identification, it is up to you to decide whether or not to believe that witness and whether that is enough evidence to convict or acquit this defend-

ant—I should say not acquit, but convict. You must decide after weighing the evidence, after weighing the credibility of each witness, whether or not you feel that the State has sustained its burden of proving this defendant guilty beyond a reasonable doubt.

In the search for the truth, you will consider what the witnesses said on the stand, and the impression they made upon you in the giving of their testimony as to truthfulness. You will consider the interest that they may have in the outcome of the case, and, in general, use your good common sense and experience in reaching a conclusion as to where the truth lies in this prosecution.

So, therefore to specifically answer this question, you are not bound to accept the testimony of anybody if you don't want to; but, if you are satisfied that they are telling the truth, and after weighing it and deciding that they are telling the truth and you are satisfied that the State has proven the defendant guilty beyond a reasonable doubt, then you must, of course, convict.

On the other hand, if after you have heard the testimony, and even though there is this 100 percent identification as is characterized by you in this note, you still feel this man is not guilty beyond a reasonable doubt, then you must acquit him.

Now, you may return to your deliberations."

No objection was made by defendant to this supplemental charge. He now contends it was inadequate in that the jurors "might have retired with the impression that if

they believed the witness was telling the truth as he or she knew it that they were bound to accept the testimony."

[8, 9] We are again asked to speculate on what the jury might have done. Considering the original charge and this supplemental charge made in response to the last question, it is highly improbable that the jury retired under the impression that it necessarily had to believe a witness who was "100 percent sure" of the identification made. Counsel for defendant must have come to the same conclusion since he did not object to the supplemental charge. Having failed to object, we should not reverse unless we find plain error to exist. *State* v. *Hipplewith,* 33 N. J. 300, 315 (1960). No such plain error exists here.

Ineffective Assistance of Counsel

Defendant contends he was ineffectively represented in that trial counsel did not move, before trial, to suppress evidence of the out-of-court identification; failed to properly argue the law on the admissibility of the identification testimony; failed to adequately explain to defendant the consequences of his waiving the court's contemplated ruling on the exclusion of the out-of-court identification, and failed to supply the State with the data called for under the alibi rule, all to defendant's prejudice.

[10, 11] A conviction, otherwise valid, will be reversed on appeal because of the ineffectiveness or inadequacy of counsel only if what he did, or failed to do, is of such magnitude as to thwart the fundamental guaranty of a fair trial. *State* v. *Dennis,* 43 N. J. 418 (1964). Putting it another way, to warrant reversal, defense counsel must

have been so incompetent as to make the trial a farce or mockery of justice. *Rivera* v. *United States,* 318 F. 2d 606 (9 Cir. 1963); *State* v. *Bentley,* 46 N. J. Super. 193 (App. Div. 1957).

[12, 13] We have examined and considered the entire record and find no justification or basis for the charges of ineffective representation. Defense counsel has been an active practitioner for about 40 years and his efforts on behalf of defendant indicate good trial preparation and technique. When experienced trial counsel adopts certain strategy in the trial of a case, and it turns out to be fruitless, such cannot be the basis for a reversal. *State* v. *Williams,* 39 N. J. 471, 489 (1963).

The conviction is affirmed.

APPENDIX D

Opinion and Order of the United States District Court

(Filed—November 10, 1970)

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil No. 586-70

UNITED STATES OF AMERICA, *ex rel.* FLEMING WOODARD,

Petitioner,

vs.

THE STATE OF NEW JERSEY and HOWARD YEAGER, the Principal Keeper of the State Prison at Trenton, New Jersey,

Respondent.

WHIPPLE, District Judge.

The petitioner, Fleming Woodard, seeks the issuance of a writ of habeas corpus pursuant to 28 U.S.C. §2241. On November 1, 1967, Woodard was convicted by a jury in Essex County for the armed robbery of Mrs. Minerva Almodovar, an employee of the Atlantic Manufacturing Company (Atlantic), located in Newark, New Jersey, and was sentenced to consecutive prison terms of 7-10 and 1-2 years. N. J. Stat. §§2A:141-1, 151-5. The Superior Court

affirmed his conviction, *State* v. *Woodard,* 102 N. J. Super. 419 (App. Div. 1968), and the Supreme Court of New Jersey denied his petition for certification and dismissed his notice of appeal. *State* v. *Woodard,* 53 N. J. 64 (1968), *cert. denied,* 395 U. S. 938 (1969). Woodard filed this petition on May 7, 1970, and on May 19th, the Essex County Prosecutor filed an answer.

Petitioner alleges in this court, as he had in the State courts, that his conviction was obtained in violation of the 14th Amendment. He maintains that the trial court committed constitutional error by admiting into evidence two in-court identifications tainted by out-of-court identifications conducted under circumstances "so unfair and suggestive as to be violative of due process of law."

In light of the arguments set forth by both petitioner and the State, a factual summary of the circumstances surrounding petitioner's conviction is warranted. Mrs. Almodovar, employed by Atlantic as a clerk-typist, testified that on April 27, 1967, at approximately 3:00 p.m., she went to the door of her office in response to a knock. She shared this office with Mr. Joseph Skopaz, an executive vice-president of the company. When she arrived at the door she saw two men through a "little window." One of these men requested a job application, and she informed him that Atlantic was not hiring. Approximately 2 minutes after returning to her desk, she looked up and saw the man who had requested the job application standing inside the office holding a gun. The man said: "Don't move. Don't scream. Give me your money." Mrs. Almodovar further testified that, when the man said, "Don't move," she put her head down and said, "Who, me?" The man said, "Yes, you," and she gave him some

money from a safe. When she handed him the money, someone said, "Is that all?", but Mrs. Almodovar could not recall whether this was said by the robber or by Mr. Skopaz who was also present in the office.

A somewhat different version of the conversation that took place during the robbery was provided by Skopaz, the only other eye-witness to the holdup. He testified that the first words spoken by the robber were, "Give me your money," and that he, Skopaz, said to Mrs. Almodovar, "Give him the petty cash box." According to Skopaz, when the robber took the money from Mrs. Almodovar he said, "Is that all?" Skopaz said, "Yes," and the robber said, "Are you sure? I will shoot." Skopaz then watched from an office window as the robber and a companion fled in a waiting car apparently driven by a third person. He called out the license plate number to Mrs. Almodovar and called the police. Skopaz estimated that the robber remained in the office from 4-5 minutes; Mrs. Almodovar approximated the time at 2 minutes.

On April 28th, the day after the robbery, Detective Farley of the Newark Police Department arrived at the scene of the crime. He obtained a description of the hold-up man as being 5′ 6″ or 5′ 7″ and of slender build. He showed four photographs to Mr. Skopaz and Mrs. Almodovar, none of which were of the petitioner. Neither eye-witness was able to make an identification. They were then taken to police headquarters where they were unable to identify a suspect shown to them.

Later the same day, the police brought a second suspect to Atlantic. This procedure was utilized because the eye-witnesses were "too busy" to return to police headquarters. Like the petitioner, this man was a Negro, but he was

5′ 11″ and weighed 180 lbs. The suspect, handcuffed to a uniformed patrolman, was walked back and forth on the sidewalk in front of a window of the office where the robbery took place. Farley testified that the suspect was not brought into the office because Mrs. Almodovar was "extremely nervous." Viewing the man from the office window, neither Mrs. Almodovar nor Skopaz were able to make an identification.

Still later that same day, another man was brought to Atlantic by the police. Mrs. Almodovar testified that she saw a detective's car pull up and a man in handcuffs get out accompanied by a detective. Mr. Skopaz could not recall if the man was handcuffed. This man was also walked back and forth on the sidewalk outside the Atlantic Office. According to Mrs. Almodovar this procedure lasted from 5-10 minutes. On this occasion both eye-witnesses identified the suspect, who was the petitioner, as the holdup man.

During the course of the trial, first Skopaz and then Mrs. Almodovar identified Woodard as the robber. Following the initial cross examination of Skopaz, conducted outside the presence of the jury, defense counsel moved to have the indictment dismissed on the grounds that the out-of-court identification procedure violated petitioner's constitutional rights. This motion was denied, but the trial judge did rule that all testimony concerning the out-of-court identifications would be excluded as unduly prejudicial under *Rule* 4 of the *New Jersey Rules of Evidence.* Defense counsel, however, waived this ruling and questioned both eye-witnesses about their post-arrest identifications of Woodard, attempting thereby to convince the jury that their in-court-identifications were based upon

what they saw on April 28th, the day of the out-of-court identifications.

As stated above, Mr. Skopaz was initially cross-examined outside the presence of the jury. At that point he testified that it "would be a lie" to say his out-of-court identification had "nothing to do" with his trial identification of petitioner. In the presence of the jury, however, he subsequently testified that his out-of-court identification did not contribute to his identification at trial.

The cross-examination of Mrs. Almodovar produced the following question and answer:

> "Q. And your identification of [petitioner] in court was based on not only what you saw when he committed the holdup, but also your seeing him for a much longer period of time the next day when he was paraded in front of your building, is that right?
>
> A. Yes, sir."

The Appellate Division affirmed petitioner's conviction even though it believed "the parading of defendant before the two victims, whether handcuffed to a detective or handcuffed and accompanied by a detective, constituted a confrontation violative of elementary principles of fairness in out-of-court identification." *State* v. *Woodard, supra,* 102 N. J. Super. at page 424. The court stated that the matter would normally be remanded to the trial judge to determine whether "the totality of the circumstances establishes clearly and convincingly that the in-court identification was the independent product of the observation of defendant by the witnesses at the time of the robbery and not substantially contributed to by the circumstances

of the out-of-court identification." *Id.* at 425. Because of the intervening death of the trial judge, however, the court decided to make its own factual determination from the record. The court held that the closeness of the victims to the robber at the time of the offense and the positiveness of Mr. Skopaz that his out-of-court identification did not contribute to his trial identification were sufficient to establish "clearly and convincingly" that the in-court identifications were not tainted. *Id.*

The problems and constitutional questions involved in post-arrest out-of-court identifications of suspects have been the subject of important recent Supreme Court decisions, beginning with *United States* v. *Wade,* 388 U. S. 218 (1967), and *Gilbert* v. *California,* 388 U. S. 263 (1967). In these cases, the Court held that a post indictment lineup was a critical stage in a criminal prosecution requiring the presence of counsel and that the admissibility of in-court identifications in cases where counsel was not present at the lineup required a determination "that the in-court identifications had an independent source, or that their introduction in evidence was in any event harmless error." *Gilbert, supra,* at 272.

In *Stovall* v. *Denno,* 388 U. S. 293, 300 (1967), however, the Court held that the constitutional rules announced in *Wade* and *Gilbert* would not be applied to pretrial identifications made before June 12, 1967. Because the out-of-court identifications in the instant case occurred on April 28, 1967, petitioner cannot and does not allege a violation of his Sixth Amendment right to counsel. Rather, he maintains that his post-arrest identification was conducted under circumstances which made his conviction violative of due process of law.

The validity of such a claim depends upon the "totality of the circumstances" surrounding the out-of-court identification. *Stovall, supra,* at 302. The test to be applied is whether the in-court identifications "stem from an identification procedure * * * 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" *Coleman* v. *Alabama,* 399 U. S. 1, 5 (1970), *quoting Simmons* v. *United States,* 390 U. S. 377, 384 (1968).

The State argues that his court should not disturb the findings of the Appellate Division that the closeness of the eye-witnesses to the robber and the positiveness with which Skopaz testified that his post-arrest identification did not contribute to his trial identification warrant a finding unfavorable to the petitioner. Additionally, this Court notes that this case is not one where misidentification can arise because the out-of-court identification and the criminal act were separated by a long period of time. *See Peetros* v. *Yeager,* Civil No. 498-68 (D. N. J. Aug. 2, 1968).

Nevertheless, this Court has concluded that the post-arrest identification procedure of the petitioner violated his right to a trial with due process of law. Although a pretrial identification of a defendant without the benefit of a lineup has not been so prejudicial absent other factors to warrant a reversal of conviction, *United States* v. *Shannon,* 424 F. 2d 476, 477 (3d Cir. 1970), the Supreme Court has recognized that "showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned." *Stovall, supra,* at 302. In *Stovall* the Court upheld a conviction of murder based upon the following pretrial identification: Two

days after the crime, a suspect was brought to a hospital room where the only eye-witness lay near death. The suspect was the only Negro in the room and was handcuffed to police officers when the witness identified him. The Court rejected the claimed violation of due process solely because the "immediate hospital confrontation was imperative." *Id.*

The case before this Court is clearly distinguishable. There was no justification for showing petitioner singly to the eye-witnesses merely because they were "too busy" to return to police headquarters. The procedure of walking the petitioner in handcuffs back and forth on the sidewalk compounded the unfairness of the situation.

Other factors contributed to the suggestiveness of the procedure employed. Although Detective Farley received a description of the robber as being 5′ 7″ and slender, the first suspect brought to the witnesses was 5′ 11″ and weighed 180 lbs, in contrast to petitioner who apparently matched the description given to Farley. Moreover, the viewing of the petitioner by the witnesses on April 24th for a "much longer" period of time than that of the robbery substantially increased the likelihood of taint. Furthermore, this Court notes that the police made no attempt to obtain a voice identification from either of the witnesses.

Considering the "totality of the circumstances" this Court holds that the pretrial identification of petitioner was "impermissibly suggestive" within the meaning of *Coleman, supra,* and *Simmons, supra,* and that the in-court identifications should have been excluded from the jury's consideration. This holding is greatly prompted by the actual testimony in the trial record that the in-court

identifications of petitioner were tainted. Mrs. Almodovar testified that her out-of-court identification did contribute to her trial identification. In *Coleman, supra,* at 5-6, the Supreme Court held: [T]he court could find on the evidence adduced at the suppression hearing that [the] identifications were entirely based upon observations at the time of the assault and not at all induced by the conduct of the lineup." In the present case, Mrs. Almodovar's testimony compels a contrary conclusion.

The State argues that Mrs. Almodovar's trial identification is not crucial since it is "cumulative" to the identification of Mr. Skopaz. In order to sustain the State's contention, however, this court must find that her in-court identification was harmless error beyond a reasonable doubt. *Chapman* v. *California,* 386 U. S. 18, 24 (1967), which I cannot do in light of the record. Mrs. Almodovar was one of only two witnesses to the crime; she was also the only person named as a victim in the indictment. Both factors indicate that the jury gave substantial weight to her testimony.

Neither is this court persuaded by the positiveness of Mr. Skopaz's in-court identification. "[P]ositiveness is irrelevant to the issue whether, consciously or subconsciously, that very in-court confidence in identification had been built up by the prior suggestive confrontation." *United States* v. *Zeiler,* 427 F. 2d 1305, 1308 (3d Cir. 1970).

Finally, the State contends that defense counsel waived his objection to the admission of the in-court identifications when he chose to cross-examine the witnesses about their out-of-court identifications. This argument is without merit. When the trial judge denied defense counsel's

motion to dismiss the indictment, the only tactical course left open to the petitioner was to explore, in detail, the out-of-court identifications in order to reveal their unfairness to the jury. Under these circumstances defense counsel cannot be said to have voluntarily waived his objection to the in-court identifications. *See Wade, supra,* 388 U. S. at 240-41.

For the reasons stated herein, it is on this 9th day of November, 1970, ORDERED that the application of petitioner be and is hereby granted and that a writ of habeas corpus shall issue. Execution of the writ should be stayed for a period of 30 days in order to permit the State the opportunity to take an appeal. If the decision of this court becomes final by reason of failure of the State to take an appeal, the indictment will then remain open and subject to retrial with the usual incident of bail to be fixed in the amount and form as shall be deemed reasonable by a state court pending retrial.

LAWRENCE A. WHIPPLE
United States District Judge